The Problem with *Dobbs* and the Rule of Legality

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In *Dobbs v. Jackson Women’s Health Organization*, the Supreme Court reversed decades of precedent to overrule *Roe v. Wade* and *Planned Parenthood v. Casey*. In anticipation of the Court’s decision, several states adopted “trigger laws” restricting abortion. These laws were explicitly drafted to take effect if *Roe* and *Casey* were overturned. These laws joined pre-*Roe* “zombie laws” that restricted abortion and were never rescinded by state legislatures despite *Roe* and its progeny. Collectively, trigger laws and zombie laws are now being used in several states to impose restrictions on reproductive autonomy. This Essay challenges the validity of these laws. Despite their eponymous names, they are not laws. When the Supreme Court affirmed the right to abortion in *Roe* and reaffirmed that right in *Casey*, any inconsistent state laws were voided. When states adopted laws contrary to *Roe* and *Casey* in the hope of future reversal, these laws were void ab initio. *Dobbs* did not and could not resurrect these laws. Prosecution under trigger laws or zombie laws would violate the rule of legality—there is no crime in the absence of a duly enacted law. Until state legislatures adopt de novo restrictions on reproductive autonomy, courts should reject any effort to rely on outdated and void legislation.

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# Table of Contents

I. Introduction .......................................................................................................................... 77  
II. The Law of *Roe* and *Casey*—And Now *Dobbs* ................................................................. 83  
III. Zombie Laws and Trigger Laws ......................................................................................... 88  
   A. Zombie Laws .................................................................................................................... 89  
   B. Trigger Laws .................................................................................................................... 90  
IV. The Rule of Legality: *Nullum Crimen Sine Lege* ............................................................... 92  
   A. Separation of Powers ....................................................................................................... 93  
   B. Legislative Authority ..................................................................................................... 100  
   C. Democracy and Political Legitimacy ............................................................................ 101  
V. Conclusion .......................................................................................................................... 104
I. INTRODUCTION

In Dobbs v. Jackson Women’s Health Organization, the Supreme Court reversed decades of precedent to overrule Roe v. Wade and Planned Parenthood of Southeastern Pennsylvania v. Casey. Because the right to abortion does not appear in the Constitution, the Court indicated that it is an unenumerated right entitled to only rational basis review by the courts. Applying this most deferential form of judicial review, the Court held that Mississippi was free to prohibit abortion because it had offered several legitimate state interests in justification of the law. Written by Justice Samuel Alito, the opinion also made clear that Roe and Casey were wrongly decided and were now overruled.

The impact of Dobbs on the health and well-being of women cannot be overstated. States that oppose abortion are now empowered to regulate, restrict, and prohibit abortion well before viability, which was the time frame previously established by Casey. As a result, many women will now be subjected to forced pregnancy and childbirth. They will suffer the physical and emotional trauma that results from an unplanned or unwanted pregnancy, including heightened risks of mental health issues and maternal morbidity and mortality. Women will also suffer from the risk of complications associated with nonviable pregnancies and miscarriages. In the absence of

1 142 S. Ct. 2228 (2022).
3 See Dobbs, 142 S. Ct. at 2283.
4 See id. at 2283–84.
5 See id. at 2242.
6 This Essay regularly refers to the impact of Dobbs on women. It does so for two reasons. First, most zombie laws and trigger laws specifically identify women as the subjects of abortion restrictions. Second, the case law consistently addresses the rights of women. However, Dobbs will also affect transgender men and nonbinary individuals. See Olivia McCormack, Transgender Advocates Say the End of Roe Would Have Dire Consequences, WASH. POST (May 6, 2022, 11:37 AM), https://www.washingtonpost.com/politics/2022/05/06/transgender-men-nonbinary-people-abortion-ro/. Accordingly, this Essay uses gender-neutral language when appropriate.
7 See 505 U.S. at 846.
9 See Frances Stead Sellers & Fenit Nirappil, Confusion Post-Roe Spurs Delays, Denials for Some Lifesaving Pregnancy Care, WASH. POST (July 16, 2022, 9:09 AM), https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-
statutory exceptions, victims of rape and incest may be forced to endure the devastating effects of their trauma for the rest of their lives.\textsuperscript{10}

Pursuant to \textit{Dobbs}, states could now require women to notify their spouses or partners before seeking an abortion.\textsuperscript{11} Indeed, women seeking abortions could even be required to obtain consent, thereby delegating control of their health care decisions to others.\textsuperscript{12} Young girls could be compelled to notify their parents or receive parental consent before accessing reproductive health services.\textsuperscript{13} Victims of domestic violence could be forced to seek the consent of their abusers.\textsuperscript{14} There are significant financial and professional consequences stemming from the \textit{Dobbs} decision as well.\textsuperscript{15} Although the fallout from \textit{Dobbs} will affect all women seeking abortions, it will have a


\textsuperscript{12} In \textit{Planned Parenthood of Central Missouri v. Danforth}, the Supreme Court held that spousal consent requirements during the first twelve weeks of pregnancy were unconstitutional. See 428 U.S. 52, 69 (1976).

\textsuperscript{13} In \textit{Bellotti v. Baird}, the Supreme Court held that parental consent requirements were unconstitutional in the absence of a judicial bypass option. See 443 U.S. 622, 643 (1979).

\textsuperscript{14} In \textit{Casey}, the Court recognized the profound consequences of a spousal notification requirement on women facing domestic violence. See 505 U.S. at 888–93.

disproportionate impact on women of color and poor women, who often have fewer resources and less access to health care.16

Through Dobbs, the Supreme Court has triggered a mass criminalization event in the United States, where millions of people may now be prosecuted for acts that were once legal and constitutionally protected.17 These laws apply to women, transgender men, and nonbinary individuals.18 They create potential legal liability for families, friends, health care professionals, employers, and coworkers.19 There are few historic parallels.20

Of course, the potential impact of Dobbs is not limited to reproductive autonomy. Having ended nearly fifty years of precedent and weakened the principle of stare decisis, the Court’s reasoning could extend far beyond the abortion debate.21 There are numerous unenumerated rights that have been

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18 Committed spouses and partners—regardless of gender—will also be affected by Dobbs. They will no longer have the ability to make family planning decisions in the absence of state intervention. See Andrée Becker, Opinion, Men Have a Lot to Lose When Roe Falls, N.Y. TIMES (May 26, 2022), https://www.nytimes.com/2022/05/26/opinion/men-abortion.html; Amandaline Jayne Miller, Opinion, Unsuspecting Men Don’t Yet Know That Overturning Roe v. Wade Will Also Change Their Lives, USA TODAY (May 11, 2022, 4:00 AM), https://www.usatoday.com/story/opinion/columnists/2022/05/11/abortion-law-roe-supreme-court-men/9667205002/?gnt-cff=1.
20 The adoption of the Eighteenth Amendment to the U.S. Constitution, which prohibited the manufacture, sale, and transportation of “intoxicating liquors,” is perhaps the most relevant example of criminalizing conduct that was previously legal. U.S. CONST. amend. XVIII, § 1. Significantly, the Amendment indicated it would not become effective until one year after ratification. Id.
21 The majority opinion argues that its approach to abortion need not extend to other unenumerated rights. See Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2280–81 (2022). However, the opinion’s own approach to “history and tradition” contradicts that assertion. See, e.g., Melissa Murray, Opinion, How the Right to Birth Control Could Be Undone, N.Y. TIMES (May 23, 2022), https://www.nytimes.com/2022/05/23/opinion/birth-
protected by the Court through the Due Process Clause of the Fourteenth Amendment. These rights—the right to contraception, the right to marry, the right of families to live together, and the right of parents to control the upbringing of their children—are now at risk of losing their heightened constitutionally protected status.22 On this point, Justice Thomas’s concurring opinion in Dobbs could not have been clearer.23

In anticipation of the Court’s decision in Dobbs, several states adopted “trigger laws” restricting abortion.24 These laws were explicitly drafted to take effect if Roe and Casey were overturned. They joined pre-Roe “zombie laws” that restricted abortion and yet were never rescinded by state legislatures despite Roe and Casey.25 Collectively, trigger laws and zombie laws are now being used in several states to impose immediate restrictions on reproductive autonomy.26


23 See Dobbs, 142 S. Ct. at 2304 (Thomas, J., concurring) (“[I]n future cases, we should ‘follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away.’ Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.” (citation omitted)).


This Essay argues that the use of zombie laws and trigger laws to prohibit and criminalize abortion violates the rule of legality—there is no crime in the absence of a duly enacted law. In fact, zombie laws and trigger laws are not laws. When the Supreme Court affirmed the right to abortion in Roe and reaffirmed that right in Casey, any inconsistent state laws were voided. When states adopted laws contrary to Roe and Casey in the hope of future reversal, these laws were void ab initio (void from inception). Dobbs ended the protections afforded by Roe and Casey, but it does not have the power to resuscitate or activate these state laws. In the absence of new state legislation adopted after Dobbs, any prosecution under zombie laws or trigger laws would violate the rule of legality and the corollary maxim of nullum crimen sine lege—there is no crime in the absence of law.

Part II of this Essay offers a brief summary of Roe, Casey, and now Dobbs. Part III then examines the current status of zombie laws and trigger laws in the United States. There are thirteen states with trigger laws regulating abortion. Zombie laws exist in nine states. Collectively, these laws will affect millions of women and countless other individuals. In response, Part


27 See H.L.A. Hart, Philosophy of Law, Problems of, in 5 The Encyclopedia of Philosophy 264, 273–74 (Paul Edwards ed., 1967) (“The requirements that the law . . . should be general . . . ; should be free from contradictions, ambiguities, and obscurities; should be publicly promulgated and easily accessible; and should not be retrospective in operation are usually referred to as the principles of legality.”); see also Jeremy Waldron, The Concept and the Rule of Law, 43 Ga. L. Rev. 1, 10 (2008) (describing the similarities between the rule of law and the rule of legality); Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 1 (1997) (arguing that “the Rule of Law needs to be understood as a concept of multiple, complexly interwoven strands”).

28 This Essay uses the terms “zombie laws” and “trigger laws” because they are routinely used to describe these legislative acts. However, the use of the word “law” does not reflect their actual legal status.

29 See infra Part III.B.

30 See infra Part III.A.

31 Dobbs will also have a significant effect on states that protect reproductive autonomy. See, e.g., Melody Gutierrez, Newsom Signs Bill Protecting California Abortion Providers from Civil Liability, L.A. Times (June 24, 2022, 2:57 PM), https://www.latimes.com/politics/story/2022-06-24/newsom-signs-bill-protecting-
IV argues that these laws cannot be used to restrict or prohibit abortion because this would violate the rule of legality. Under the rule of legality, zombie laws are void, and trigger laws are void ab initio. Thus, advocates of reproductive autonomy should not concede the applicability of these laws. There are compelling arguments to be made. Indeed, these arguments extend to any subject area where zombie laws remain “on the books” or trigger laws await activation.

The rule of legality offers only temporary protection against abortion restrictions in states where these statutes exist. Pursuant to Dobbs, state legislatures may adopt de novo restrictions on reproductive autonomy. Until such time, courts should reject any efforts to restrict access to abortion through outdated and void legislation. Prosecutors should also consider

california-abortion-providers-from-civil-liability (referencing research that thousands of women will travel to California seeking abortion care); Fahima Haque, Which States Are Reinforcing Abortion Rights?, N.Y. TIMES (May 4, 2022), https://www.nytimes.com/2022/05/04/us/abortion-rights-protections.html (listing several bills that seek to protect the right to abortion care); Elaine Kamarck, What Happens After Roe v. Wade?, BROOKINGS (May 3, 2022), https://www.brookings.edu/blog/fixgov/2022/05/03/americas-after-roev-wade/ [https://perma.cc/M5K7-DTYU] (describing how Dobbs will have implications beyond the borders of states that prohibit abortion).

See infra Part IV.


The rule of legality does not prevent constitutional challenges or jurisprudential changes. When a state adopts legislation contrary to Supreme Court precedent, it would be challenged through litigation. Indeed, this is precisely what happened in Dobbs. The Supreme Court’s authority to engage in judicial review is distinct from whether the outcome of such review should reanimate zombie laws or activate trigger laws.

whether bringing charges for violating these laws comports with the rule of legality.\textsuperscript{36}

II. THE LAW OF \textit{ROE} AND \textit{CASEY}—AND NOW \textit{DOBBS}

In \textit{Roe v. Wade}, the Supreme Court confronted a challenge to a Texas statute that criminalized abortion except in cases where it was necessary to save the life of the mother.\textsuperscript{37} Under the applicable federal jurisdictional statute at that time, the Court considered the case as a direct appeal from a special three-judge panel which held the Texas statute void.\textsuperscript{38} The Court analyzed the constitutionality of the statute through the Due Process Clause of the Fourteenth Amendment. \textit{Roe} was one of several cases where the Court would address this discrete yet profound constitutional issue.\textsuperscript{39}

Writing for a 7-2 majority, Justice Blackmun acknowledged the “sensitive and emotional nature of the abortion controversy,” as well as its complexity.\textsuperscript{40} Informed by “the relative weights of the respective interests involved,” “the lessons and examples of medical and legal history,” “the lenity of the common law,” and “the demands of the profound problems of the present day,” the Court developed a trimester framework for assessing permissible


\textsuperscript{37} 410 U.S. 113, 164 (1973).


\textsuperscript{39} In \textit{United States v. Vuitch}, the Court held that a D.C. statute prohibiting abortion except in cases where the mother’s life or health was at risk was not unconstitutionally vague. 402 U.S. 62, 70–72 (1971). However, the Court did not address whether the right to abortion itself was a substantive due process right entitled to heightened protection under the Due Process Clause.

\textsuperscript{40} \textit{Roe}, 410 U.S. at 116. Although moral standards and religious beliefs informed the abortion debate, the Court recognized other factors were also relevant, including concerns about “population growth, pollution, poverty, and ra[ce].” \textit{See id.}
state regulation of abortion.\textsuperscript{41} This framework sought to balance the competing and significant interests in the case.

According to the Court, the level of permissible state regulation of abortion increased with each trimester. The first trimester was defined as the period of time between conception and the end of the first three months of pregnancy, when a mother’s risk of “mortality in abortion may be less than mortality in normal childbirth.”\textsuperscript{42} During the first trimester, a woman’s right to choose whether to terminate her pregnancy was her own, informed by “the medical judgment” of her physician.\textsuperscript{43} The second trimester was defined as the time period between three and six months of pregnancy, the end of which coincided with the potential viability of the fetus “outside the mother’s womb.”\textsuperscript{44} During the second trimester, the state had a greater interest in overseeing the abortion decision and could “regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.”\textsuperscript{45} In the third trimester, fetal viability became the deciding factor. At this point, the state could choose to “regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”\textsuperscript{46} Applying this framework, the Court struck down the Texas statute because it failed to consider the stages of pregnancy or a woman’s interests in the abortion decision.\textsuperscript{47}

When \textit{Roe} was decided by the Court, it affirmed the legal status of abortion in the United States. It was, however, subject to withering criticism.\textsuperscript{48} Some states adopted legislation that pushed the boundaries of the

\textsuperscript{41} Id. at 164–65.
\textsuperscript{42} Id. at 163.
\textsuperscript{43} See id. at 164.
\textsuperscript{44} Id. at 163.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 165.
\textsuperscript{47} See id. at 162–64.
trimester framework and the scope of permissible restrictions. On several occasions, the Court revisited Roe to reconsider its position on the constitutional protections afforded to reproductive rights.

Almost twenty years later, the Supreme Court affirmed Roe’s essential holding in Planned Parenthood of Southeastern Pennsylvania v. Casey. In Casey, however, the Court replaced Roe’s trimester framework with a semester framework, using viability as the temporal divider. Before viability, Casey established an “undue burden” standard that allowed women to make informed decisions about their reproductive rights but also allowed for some level of state regulation. Such regulations were justified so long as they did not pose a “substantial obstacle” for women seeking an abortion. After viability, the state interest was seen as sufficiently compelling so that it could prohibit abortion except where it was necessary to protect the life or health of the mother.

Casey affirmed Roe’s essential holding of heightened constitutional protection for reproductive autonomy. However, it still did not end the abortion debate. States continued to push the boundaries of permissible regulation, forcing the Court to repeatedly revisit the undue burden standard. These state efforts were emboldened by the Court’s changing ideological composition, and the argument that reproductive rights were not entitled to heightened constitutional protection.

Although the Court

49 See generally M. David Bryant, Jr., State Legislation on Abortion after Roe v. Wade: Selected Constitutional Issues, 2 AM. J.L. & MED. 101 (1976) (citing state laws passed after Roe which retained criminal penalties of the kind which might be impermissible under Roe).
52 See id. at 878–79.
53 See id.
54 See id.
55 See id. at 879.
57 See, e.g., Gonzales, 550 U.S. at 169 (Thomas, J., concurring) ("I write separately to reiterate my view that the Court’s abortion jurisprudence, including Casey and Roe v. Wade, has no basis in the Constitution." (citations omitted)); Hill v. Colorado, 530 U.S. 703, 741–42 (2000) (Scalia, J., dissenting) ("Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court
continued to uphold abortion rights in several cases, it became clear that the Court’s ideological composition would determine whether reproductive autonomy would remain a privileged and protected right.\(^{58}\)

In 2018, Mississippi adopted the Gestational Age Act, which prohibited most abortions after fifteen weeks.\(^{59}\) In its legislative findings clause, the Act cited language from both *Roe* and *Casey* that acknowledged a state’s interest in protecting the potential for human life.\(^{60}\) However, the Act made no reference to the operative language from *Roe* or *Casey* protecting the right to abortion before viability. On the day the Act was signed into law, Jackson Women’s Health Organization and one of its doctors filed a federal lawsuit challenging the Act and sought a temporary restraining order to enjoin its enforcement.\(^{61}\) The district court granted the plaintiffs’ request for injunctive relief and eventually held that the Act was unconstitutional.\(^{62}\) The Fifth Circuit Court of Appeals affirmed, relying on *Roe* and *Casey*.\(^{63}\) The Supreme Court then granted certiorari to address whether “all pre-viability prohibitions on elective abortions are unconstitutional.”\(^{64}\)

In *Dobbs v. Jackson Women’s Health Organization*, the Court rejected almost fifty years of precedent to overturn both *Roe* and *Casey*.\(^{65}\) Written by Justice Alito, the opinion framed its approach through both a textualist and originalist lens, finding that the Constitution contained no provisions protecting or even addressing the right to abortion.\(^{66}\)


\(^{60}\) See id. § 41-41-191(2)(b)(7).


\(^{63}\) See Jackson Women’s Health Org. v. Dobbs, 945 F.3d 265, 271, 277 (5th Cir. 2019).


rights were still subject to some constitutional protection, the Court indicated that heightened protection was only available for those rights that were “rooted in our Nation’s history and tradition” and were considered “an essential component of . . . ordered liberty.”67 Despite the historical findings identified in both Roe and Casey, the Court found no such historical support for the right to abortion.68

The Court then addressed why stare decisis did not support upholding Roe and Casey. Although the Court recognized its value and significance, it did not view stare decisis as “an inexorable command.”69 According to Justice Alito, five factors counseled overruling Roe and Casey: “the nature of their error, the quality of their reasoning, the ‘workability’ of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.”70 Collectively, these five factors justified ending Roe and Casey as legal precedent.71

The Court rejected several legal and policy concerns with its decision. It acknowledged that many Americans would disagree with its decision, yet it refused to defer to public opinion.72 Moreover, the Court indicated that Roe and Casey had not resolved the abortion issue; they “inflamed” it and prolonged “a rancorous national controversy.”73 (Presumably, Justice Alito believes his own opinion will escape this fate.) Responding to concerns that the Court’s decision could now be used to challenge other unenumerated rights, the Court attempted to portray its opinion in narrow terms, stating that its decision “concerns the constitutional right to abortion and no other right.”74 It also noted that abortion is a “unique act” and distinguishable from other rights because it implicates the termination of “potential life.”75

Having established that abortion was not a fundamental right entitled to protection under strict scrutiny or even the undue burden standard, the Court determined that restrictions on this right were only entitled to rational basis review.76 Under rational basis review, state action will be upheld “if there is

67 See Dobbs, 142 S. Ct. at 2244.
68 See id. at 2248–49. To bolster its historical analysis, the Court included two appendices. The first appendix listed all the state statutes criminalizing abortion that existed in 1868, which was the operative date of the Fourteenth Amendment. See id. at 2285–97. The second appendix listed all the statutes criminalizing abortion in the Territories that became states as well as in the District of Columbia. See id. at 2297–300.
69 See id. at 2278.
70 Id. at 2265.
71 See id.
72 See id. at 2278.
73 Id. at 2279.
74 See id. at 2277.
75 Id. at 2258, 2277.
76 See id. at 2283–84.
a rational basis on which the legislature could have thought that it would serve legitimate state interests.” The Court found several such legitimate interests, which were sufficient to justify Mississippi’s legislation prohibiting abortions after fifteen weeks.

In closing, the Court acknowledged that “[a]bortion presents a profound moral question.” Accordingly, it is a question that should be answered, not by the Constitution, but by “the people and their elected representatives.” The Court’s decision to uphold the Mississippi statute was 6-3. Chief Justice Roberts concurred in this outcome, but he disagreed with the Court’s broader decision to overturn Roe and Casey. In a rare joint dissent, Justices Breyer, Kagan, and Sotomayor conveyed grave concerns with the Court’s decision, its impact on women, and its potential extension to other constitutional rights.

III. ZOMBIE LAWS AND TRIGGER LAWS

Roe and Casey reflected the “law of the land” for many years. However, the landscape of reproductive rights was far from clear. Some states never rescinded abortion laws that were contrary to the Court’s explicit holdings. Other states adopted laws in direct contravention of the Court’s decisions. Many of these laws included a juridical condition precedent—that they would go into effect only if the Court reversed Roe and Casey. Zombie laws and trigger laws share similar features. However, they are distinct.

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77 Id. at 2284.
78 These interests included: “respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.” Id. (citations omitted).
79 Id.
80 Id.
81 See id. at 2310–11 (Roberts, C.J., concurring).
82 See id. at 2317–19 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
83 See infra text accompanying note 94.
84 See infra text accompanying note 100.
85 See Wasserman, supra note 33, at 1059–67 (describing three types of zombie laws); Berns, supra note 26, at 1647–50 (distinguishing trigger laws from other statutes); Alexander, supra note 26, at 388–93 (distinguishing revival laws and sunset laws).
A. ZOMBIE LAWS

When a law is first adopted by an authorized political body, it is placed in a designated section of the statutory code. The term “zombie law” refers to legislation that has been found unconstitutional or otherwise contrary to extant law and yet still remains in the statutory code. Although these laws are codified, they are unenforceable because of a judicial decision. Zombie laws exist in countless areas of law.

Several legal commentators have argued that unconstitutional laws never die; they are merely dormant. Because they remain codified and have not been formally rescinded by the legislature, they may become enforceable if the relevant jurisprudence changes. For example, Jonathan F. Mitchell argues that “federal courts have no authority to erase a duly enacted law from the statute books, and they have no power to veto or suspend a statute.” When a court finds a statute unconstitutional, he argues, this simply permits the court to decline enforcement and to enjoin officials from enforcing the statute. These adverse rulings do not “str[ike] down,” “nullif[y],” or

87 The term was first used in Pool v. City of Houston. 978 F.3d 307, 309 (5th Cir. 2020) (describing a city ordinance as a zombie law because it remained codified even though the U.S. Supreme Court had found a similar law to be unconstitutional). See Wasserman, supra note 33, at 1051. Zombie laws have also been referred to as “revival laws.” See Alexander, supra note 26, at 389.
91 See id.
“render[] ‘void’” legislation. Mitchell refers to this as the “writ-of-erasure fallacy.”

Although Roe limited state authority to restrict abortion, several states did not formally rescind laws that were contrary to the Supreme Court’s decision. In fact, there are currently nine states with pre-Roe zombie laws: Alabama, Arizona, Arkansas, Michigan, Mississippi, Oklahoma, Texas, West Virginia, and Wisconsin. The law of each state differs. However, they each purport to restrict or prohibit abortion altogether. If the writ-of-erasure fallacy is correct, the zombie laws of these nine states were revived by Dobbs and are now valid and enforceable.

**B. TRIGGER LAWS**

The term “trigger law” refers to legislation that is adopted in anticipation of a future act. Until the condition precedent occurs, the law remains dormant. Most trigger laws explicitly include the condition precedent in the legislation. Some trigger laws are immediately activated upon the occurrence of the condition precedent; others are activated after a brief waiting period.

As the Supreme Court began its inexorable journey to Dobbs, several states announced their intention to adopt trigger laws that would activate in the event Roe and Casey were overturned. Upon activation by the juridical condition precedent, these laws would criminalize abortion in their jurisdictions. There are currently thirteen states with trigger laws: Arkansas,
Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming.100

In Louisiana, for example, the Human Life Protection Act (Act 467) was enacted in 2006 and provides:

No person may knowingly administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being. No person may knowingly use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being.101

Because Roe and Casey prevented states from adopting absolute prohibitions on abortion, the Act did not take effect immediately. Instead, the Louisiana legislature indicated the Act would become effective upon the occurrence of either of the following two conditions:

(1) Any decision of the United States Supreme Court which reverses, in whole or in part, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), thereby, restoring to the state of Louisiana the authority to prohibit abortion.

(2) Adoption of an amendment to the United States Constitution which, in whole or in part, restores to the state of Louisiana the authority to prohibit abortion.102

If trigger laws are viable and simply awaiting activation, Dobbs activated the Human Life Protection Act.

Collectively, zombie laws and trigger laws are poised to curtail reproductive rights for millions of women now that the Supreme Court has issued its opinion in Dobbs.103 Although they represent distinct legal

100 See GUTTMACHER INST., supra note 94.
101 LA. STAT. ANN § 40:1299.30 (2006) (current version at LA. STAT. ANN § 40:1061(C)).
102 Id. § 40:1061(A).
103 The effective date of a Supreme Court opinion varies based on whether the case arises out of state or federal proceedings. See SUP. CT. R. 45. For example, a mandate shall be issued twenty-five days after entry of judgment in a case on review from a state court unless the Court shortens or extends the time. SUP. CT. R. 45(2). If the case is on review from a federal court, there is no formal mandate unless the Court requests that a mandate be issued. See SUP. CT. R. 45(3). Instead, the Supreme Court clerk will send a copy of the opinion and a certified copy of the judgment to the lower court. See id. See generally Josh Blackman, When Does a Supreme Court Judgment Become Effective?, VOLOKH CONSPIRACY (July 17, 2020, 5:35 PM), https://reason.com/volokh/2020/07/17/when-does-a-supreme-court-judgment-become-effective/ [https://perma.cc/3TP5-VUVE].
scenarios, zombie laws and trigger laws share several features. First, they purport to establish law based upon a future jurisprudential change—a juridical condition precedent. Second, they bind future polities with laws that have been found unconstitutional either before or after their adoption. Third, they generate criminal liability for an activity that was lawful prior to the jurisprudential change. Each of these features implicates the rule of legality.

IV. THE RULE OF LEGALITY: NULLUM CRIMEN SINE LEGE

The rule of legality is one of the oldest and most fundamental norms of due process and the rule of law. It has been referred to as “the first principle of American criminal law jurisprudence.” To be valid and enforceable, a law must be duly enacted by the appropriate legislative body through established procedures. When the government acts outside of its lawful and delegated authority, such acts are considered ultra vires. A law that was enacted in such manner is void ab initio. Laws that are subsequently found unconstitutional are void. The rule of legality is reflected in several principles, including the abolition of common law crimes, the prohibition of ex post facto laws, and the void-for-vagueness doctrine. It can also be

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106 See Gallant, supra note 104, at 15 (“[L]egality is a requirement that the specific crimes, punishments, and courts be established legally – within the prevailing legal system.”).
107 See City of Arlington v. FCC, 569 U.S. 290, 297 (2013) (“Both [agencies’] power to act and how they are to act are authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires.”). See generally Michael Sebring, Note, Restoring the Essential Safeguard: Why the Abbott Test for Preclusion of Judicial Review of Agency Action Is an Inadequate Method for Protecting Separation of Powers, 18 GEO. J.L. & PUB. POL’Y 181 (2020) (arguing that Congress may not prevent judicial review of agency actions, particularly when such actions may be ultra vires); James Barclay Smith, Relief from Ultra Vires Governmental Action, 42 MARQ. L. REV. 429 (1959) (discussing problematic ultra vires governmental action).
108 See Gusman v. Marrero, 180 U.S. 81, 83 (1901) (“[T]he Act goes far beyond the limits of legislative authority, is ultra vires, and absolutely null and void, and everything done under it equally null and void.”).
The maxim, *nullum crimen sine lege*—there is no crime in the absence of law,—understood by reference to the maxim, *nullum crimen sine lege*—there is no crime in the absence of law.110

The rule of legality has a profound impact on zombie laws and trigger laws. Despite their eponymous names, zombie laws and trigger laws are not laws. And despite its compelling narrative, the writ-of-erasure fallacy is itself a fallacy.

A. SEPARATION OF POWERS

First, trigger laws violate the separation of powers by delegating legislative authority to the U.S. Supreme Court.111 All legislation requires interpretation, which means all laws leave “some residuum of policymaking power” to the courts.112 For this reason, judicial review is essential in any legal system. There is, however, a meaningful distinction between passive interpretation and active construction: “[A]t some point a line is crossed between a nuanced, interstitial job of interpreting reasonably definite statutes as applied to specific cases and a full bore assignment to the courts to create the crime in the first instance.”113

Consider, for example, the trigger law adopted by Texas. The Human Life Protection Act (H.B. 1280) was adopted by the Texas legislature in 2021.114 The law established criminal liability for any person who “perform[s], induce[s], or attempt[s] an abortion.”115 However, it did not take effect upon its adoption. Rather, the law provided that H.B. 1280 shall take effect on the thirtieth day after:

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110 See Beth Van Schaack, Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals, 97 GEO. L.J. 119, 121 (2008); Jerome Hall, Nulla Poena Sine Lege, 47 YALE L.J. 165, 165 (1937). See generally Stefan Glaser, Nullum Crimen Sine Lege, 24 J. COMP. LEGIS. & INT’L L. 29 (1942) (discussing the origin and purpose of *nullum crimen sine lege*). The principle of *nulla poena sine lege* (there is no punishment in the absence of law) is a corollary to *nullum crimen sine lege*.

111 SUTHERLAND, supra note 86, § 4:6 (“The doctrine of separation of powers does not permit a legislature to abdicate its function to the judiciary by passing statutes which operate at the discretion of the courts, or under which courts are allowed to determine conditions in which the statute will be enforced.”).


115 TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (2021). The statute includes limited exceptions, such as situations where the abortion is necessary to protect the life of the mother or is necessary to prevent the substantial impairment of a major bodily function. See id. § 170A.002(b)(2).
(1) the issuance of a United States Supreme Court judgment overruling, wholly or partly, Roe v. Wade, 410 U.S. 113 (1973), as modified by Planned Parenthood v. Casey, 505 U.S. 833 (1992), thereby allowing the states of the United States to prohibit abortion;

(2) the issuance of any other United States Supreme Court decision that recognizes, wholly or partly, the authority of the states to prohibit abortion; or

(3) adoption of an amendment to the United States Constitution that, wholly or partly, restores to the states the authority to prohibit abortion.\textsuperscript{116}

Essentially, Texas inserted a juridical condition precedent into the law and delegated adoption of the criminal provisions of the Act to the U.S. Supreme Court. Unlike legislation that requires a court to interpret and apply extant law, this statute empowers the Supreme Court to decide if, when, and even how these provisions would go into effect.\textsuperscript{117} This represents an extraordinary degree of legislative delegation.

Not all forms of delegation are unconstitutional. Indeed, the Supreme Court has upheld many examples.\textsuperscript{118} A key factor for assessing their legitimacy is to determine whether the delegation is accompanied by an “intelligible principle” to guide the exercise of legislative authority.\textsuperscript{119} However, the Supreme Court has been skeptical of delegations that encroach on the separation of powers and the unique lawmaking authority of Congress.\textsuperscript{120}

In INS v. Chadha, for example, the Court struck down a portion of the Immigration and Nationality Act because it granted one chamber of Congress

\textsuperscript{116} Human Life Protection Act, H.B. 1280 § 3, 87th Leg., Reg. Sess. (Tex. 2021). This provision is codified in the preamble to Chapter 170A of the Texas Health & Safety Code.

\textsuperscript{117} Cf. FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 879–80 (Tex. 2000) (acknowledging that legislative delegation had occurred because a statute gave private landowners authority to decide “whether, how, and to what extent” public duties applied to them).


\textsuperscript{119} J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

the authority to veto executive actions. The opinion highlights the constitutional problems that arise through the transfer of clearly delineated legislative powers. Writing for the majority, Chief Justice Burger noted that efforts to bypass the fulsome features of the legislative process were inconsistent with the careful checks and balances crafted by the Framers. To “preserve freedom” and “protect the people from the improvident exercise of power,” legislation was meant to “be a step-by-step, deliberate and deliberative process.”

In Clinton v. City of New York, the Court considered a different form of delegation and struck down the federal Line Item Veto Act because it allowed the President to veto duly enacted laws in violation of the Presentment Clause of the Constitution. Again, the Court highlighted the importance of respecting the established delineation of political authority. Citing Chadha, the Court noted that “the power to enact statutes may only ‘be exercised in accord with a single, finely wrought and exhaustively considered, procedure.’” As described by Justice Kennedy in his concurring opinion, “liberty demands limits on the ability of any one branch to influence basic political decisions.” Therefore, it was immaterial that Congress surrendered its own authority or that Congress could adopt a new law achieving the same outcome.

Although these cases involved federal legislation and compliance with the federal constitution, the core principles conveyed in them regarding constitutional design, government structure, and the separation of powers apply with equal rigor to state laws.

For example, the Texas Constitution establishes the separation of powers among the three branches of state government and prohibits the delegation of their respective powers. Texas courts have indicated that the separation of powers “is well established in Texas,” and its principles are informed by the

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122 See id. at 955–59.
123 See id. at 957, 959.
125 Id. at 439–40 (quoting Chadha, 462 U.S. at 951).
126 Id. at 450–51 (Kennedy, J., concurring).
127 See id. at 451–52.
128 See id. at 455–59.
129 See id. at 957, 959.
130 See id. at 439–40 (quoting Chadha, 462 U.S. at 951).
131 See id. at 450–51 (Kennedy, J., concurring).
132 See id. at 451–52.
133 These principles have a lengthy history in both American and English political theory. See, e.g., John Locke, The Second Treatise of Government § 141, in TWO TREATISES OF GOVERNMENT 408 (Peter Laslett ed., 1963) (“The Legislative [sic] cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others.” (emphasis in original)). In fact, many states have explicitly codified the prohibition against delegating authority between the coordinate branches of government. See Whittington & Iuliano, supra note 120, at 415.
134 See TEX. CONST. art. 2, § 1.
U.S. Constitution. As a result, Texas courts recognize that only the legislature may pass laws and that this “power cannot be delegated to some commission or other tribunal.” In fact, the Texas Legislative Council’s Drafting Manual indicates that statutory references to laws that have not been enacted by the Texas Legislature “raise a question regarding whether the incorporation by reference is an unconstitutional delegation of legislative power.”

Like their federal counterparts, Texas courts have upheld some forms of delegation, subject to narrow constraints. Significantly, Texas courts have expressed concern with delegation to laws that did not exist at the time the delegating statute was enacted. The legitimacy of legislative delegation to the judiciary is also disputed. The Texas Legislative Council’s Drafting Manual does not even address whether delegation through a juridical condition precedent is allowed. Although it acknowledges that incorporation by reference to statutory language may be permissible, it is silent on incorporation by reference to future judicial opinions. These principles of constitutional design, government structure, and the separation of powers are not unique to Texas and can be found in other states.

130 See Ex parte Elliott, 973 S.W.2d 737, 740 (Tex. App. 1998); see also Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 465 (Tex. 1997).

131 See Brown v. Humble Oil & Ref. Co., 83 S.W.2d 935, 941 (Tex. 1935); see also Ex parte Leslie, 223 S.W. 227, 227 (Tex. Crim. App. 1920) (“The power to make laws is placed by the people, through the Constitution, upon the Legislature.”).


133 See, e.g., Ex parte Elliott, 973 S.W.2d at 742 (accepting delegation but only to laws that were in existence at the time the referencing Texas statute was enacted); see also TEXAS LEGISLATIVE COUNCIL, supra note 132. But see BCCA Appeal Grp., Inc. v. City of Houston, 496 S.W.3d 1, 24 (Tex. 2016).


135 See TEXAS LEGISLATIVE COUNCIL, supra note 132, at 159–61; see also id. at 281 (memorandum from Mark Brown, Legal Division Director, Texas Legislative Council).

136 See, e.g., LA. CONST. art. II, § 1 (“The powers of government of the state are divided into three separate branches: legislative, executive, and judicial.”); LA. CONST. art. II, § 2 (“Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.”); State v. Miller, 857 So.2d 423, 427 (La. 2003) (“Under the separation of powers doctrine, unless the constitution expressly grants an enumerated legislative power to the executive or the Legislature has enacted a statute expressly authorizing another branch to exercise its power, the executive does not have the power to perform a legislative function.”); Mid-City Auto., L.L.C. v. Dep’t of Pub. Safety & Corr., 267 So.3d 165, 175
Accordingly, state courts should be skeptical when legislatures delegate significant authority to other branches of government. Delegation of legislative authority to the judiciary, such as through a juridical condition precedent, remains a rare occurrence and implicates separation of powers concerns. These concerns are even more pronounced when they involve delegation to a different sovereign. Both Chadha and Clinton involved delegation between coordinate branches of the federal government. In contrast, trigger laws involve delegation from state legislatures to the U.S. Supreme Court. There is no constraint to this delegation or “intelligible principle” to guide the Court in its legislative task. In fact, constraints imposed by state legislatures would themselves give rise to separation of powers and federal supremacy challenges. Finally, concerns about delegation are further heightened in the criminal law realm because “criminal conviction and sentence represent the ultimate intrusions on personal liberty


138 Perhaps the most well-known example of legislative delegation to the judiciary involves the Rules Enabling Act. Passed by Congress in 1934, the Act authorizes the Supreme Court to make rules relating to practice and procedure in the federal courts. See 28 U.S.C. § 2072(a). However, it contains a significant limitation. Such rules cannot “abridge, enlarge or modify any substantive right.” Id. § 2072(b). Notwithstanding this significant restriction, there are still colorable questions about its legitimacy. See Martin H. Redish & Uma M. Amuluru, The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications, 90 MINN. L. REV. 1303, 1307 (2006).

139 In any federal system, there will inevitably be interactions between federal and state actors. However, such cross-sovereign interactions must be clearly established. See, e.g., 28 U.S.C. § 1257 (authority of Supreme Court to review final judgments issued by state courts); 28 U.S.C. § 1332 (authority of federal courts to consider state claims); 28 U.S.C. § 1441(b) (removal of state actions to federal courts).

140 See Mistretta v. United States, 488 U.S. 361, 372 (1989); see also Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 740–41 (Tex. 1995) (recognizing that delegation is permissible only if the legislature provides “reasonable standards to guide the entity to which the powers are delegated”).

141 See generally Erwin Chemerinsky, In Defense of Judicial Supremacy, 58 WM. & MARY L. REV. 1459 (2017) (addressing the value of judicial supremacy in the realm of constitutional interpretation); Hugh E. Willis, The Doctrine of the Supremacy of the Supreme Court, 6 IND. L.J. 224 (1931) (discussing the doctrine of judicial supremacy).
and carry with them the stigma of the community’s collective condemnation.” In sum, state legislatures have no authority to cede their sovereign power through trigger laws. These efforts generate laws that are void ab initio.

The principle that laws found unconstitutional are void ab initio can be traced to Marbury v. Madison. In his opinion setting forth the core features of judicial review, Chief Justice Marshall stated that “a law repugnant to the constitution is void.” This principle was affirmed by the Court in more forceful terms in Norton v. Shelby County. Writing for the Court, Justice Field indicated that “[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.” This legal reasoning has also been used by state courts and has been formally codified in several jurisdictions.

Some commentators have argued that the void ab initio principle is mistaken and that courts have no authority to annul legislative pronouncements. Mitchell, for example, argues that a finding of unconstitutionality simply means that a court will “decline to enforce a statute” and that “it permits a court to enjoin executive officials” from enforcing the statute. Otherwise, the statute remains in abeyance. Other scholars have made similar arguments about the limited impact of adverse rulings on a statute’s existence.

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143 See 5 U.S. 137 (1803).
144 Id. at 180; see also McCulloch v. Maryland, 17 U.S. 316, 423 (1819).
145 See 118 U.S 425 (1886).
146 Id. at 442.
148 See, e.g., GA. CONST., art. I, § II, ¶ 5(a) (“Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them.”). See also Alexander supra note 26, at 400–02 (discussing how anti-abortion trigger laws conflict with nondelegation principles).
149 Mitchell, supra note 90, at 936.
150 See id. at 937.
These arguments assert that judicial decisions are temporary: “A court’s constitutional pronouncements reflect only its current views of the Constitution and the judiciary’s role in enforcing it.”152 A court may change its mind.153 Yet, this critique proves too much.154 If a court’s constitutional pronouncements reflect only its current views, the same could be said about legislation: statutes only reflect the views of the legislatures that adopted them. If a court reverses an earlier decision interpreting a statute, there is no guarantee (or even likelihood) that its decision corresponds to the views of the current legislature. Rejecting the void ab initio principle would allow the reinstatement of laws that may not represent the will of the people and their elected representatives.155 These concerns are multiplied in a federal system that includes fifty distinct legislatures. Instead, these renewed laws would only represent the views of the current judiciary.

Challenges to the void ab initio principle disregard the structural shortcomings of trigger laws. Not every legislative act is necessarily a law. Trigger laws were adopted after a finding of unconstitutionality and purport to impose future criminal liability through a juridical condition precedent. This methodology is antithetical to the separation of powers.156 It is contrary to the purpose of codification, which seeks completeness in the statutory code and requires statutes to be fully formed when adopted by the designated

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152 Mitchell, supra note 90, at 942 (emphasis in original).
153 Courts are more likely to “change their mind” when there is a change in their composition. See Michael J. Gerhardt, The Limited Path Dependency of Precedent, 7 U. PA. CONST. L. 903, 952 (2005).
154 When a court’s composition changes, this does not invalidate the court’s prior decisions.
155 See infra Part IV(C).
156 There is an intriguing connection between the separation of powers concerns implicated in the delegation of legislative authority and the vagueness doctrine. See Arjun Ogale, Note, Vagueness and Nondelegation, 108 VA. L. REV. 783, 785–86 (2022). In recent years, this connection has been highlighted by the Supreme Court. See, e.g., United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (The vagueness doctrine “rests on the twin constitutional pillars of due process and separation of powers.”); Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (The vagueness “doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.”).
legislative body. In fact, this explains why some states explicitly require statutes to “set forth completely the provisions of the law enacted, amended, or revived.” Matthew Adler and Michael Dorf would argue that legislation which violates “existence conditions”—such as those that implicate the mechanisms of lawmaking—do not give rise to “laws.” As a result, such legislative acts would be void ab initio.

B. LEGISLATIVE AUTHORITY

Second, the delegation of legislative authority through trigger laws raises a related concern. Only designated government bodies are authorized to draft and adopt laws. Although the separation of powers may prevent a government body from delegating its authority, a distinct issue is whether the government body receiving this authority is empowered to act on it. In Texas, for example, the Penal Code provides that “[c]onduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, order of a county commissioners court, or rule authorized by and lawfully adopted under a statute.” Texas courts have also indicated that the legislature alone is vested with the authority to define crimes and fix punishment for those crimes; only narrow exceptions have been recognized. This highlights the flaws in the Texas Human Life Protection Act. It delegates the authority of defining the offense to the U.S. Supreme Court instead of one of the authorized government institutions identified in the Texas Penal Code. The Louisiana Criminal Code contains a similar provision, stating that “[a] crime is that conduct which is defined as criminal in this Code, or in other acts of the legislature, or in the constitution of this state.” Similarly, the Model Penal Code requires criminal offenses to be codified under the Code or a state statute. It is conspicuously silent on other

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158 See, e.g., LA. CONST. art. III, § 15(B).
160 TEX. PENAL CODE ANN. § 1.03(a) (2003).
161 See supra text accompanying notes 133–135.
163 See MODEL PENAL CODE § 1.05(1) (AM. L. INST. 1985) (“No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State.”); see also George P. Fletcher, Dogmas of the Model Penal Code, 2 BUFF. CRIM. L. REV. 3,
sources. In sum, courts are simply not authorized to engage in the legislative process, particularly in the criminal law realm.

In fact, trigger laws raise the specter of common law crimes, a system of law that was replaced long ago. As described by Carissa Hessick, it is “incompatible with our system of divided government.” Indeed, “[t]he idea that courts could play a role, let alone a primary role, in deciding what conduct should be criminalized is seen as antithetical to the rule of law.” If common law crimes have been abolished, “it logically follows that the power of present courts to create new offenses ought to be similarly restricted.” This explains the motivating rationale behind the Model Penal Code—to prevent judicial lawmaking by defining offenses with sufficient scope and clarity.

Trigger laws are incomplete when drafted, and they are not enforceable upon their adoption. Instead, they require the fulfillment of a juridical condition precedent to become fully formed and enforceable. This is categorically different from the classic paradigm of judicial review and statutory construction, where courts interpret extant legislation that is fully formed. By delegating such extensive legislative authority to the U.S. Supreme Court, trigger laws empower the Court to create new crimes, albeit with state support. Such legislative efforts are void ab initio.

C. DEMOCRACY AND POLITICAL LEGITIMACY

Finally, both zombie laws and trigger laws raise broader concerns about democracy and the political process. Even in abeyance, these laws have profound consequences.

Zombie laws and trigger laws chill constitutionally protected activity in several ways. They send an unmistakable message to affected individuals that

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11 (1998) (“The Model Penal Code makes a strong commitment to the principle nulla poena sine lege in section 1.05(1)[.]”)


165 Carissa Byrne Hessick, The Myth of Common Law Crimes, 105 VA. L. REV. 965, 1013 (2019). To be fair, Professor Hessick argues that the shift from common law crimes to criminal statutes has its own significant shortcomings.

166 Id. at 966.

167 Robinson, supra note 104, at 341.


169 See Richman, supra note 142, at 321; Lemos, supra note 112, at 421.

170 The rule of legality implicates numerous values, including promoting respect for human rights, supporting the legitimacy and structure of democratic governance, and affirming the purposes of criminalization. See GALLANT, supra note 104, at 19–20.
their rights are precariously positioned. These silent laws “convey[] meaning about the worth and value of the regulated person or conduct.” Such messages can cause damage through stigma and isolation. They may also cause individuals to change their behavior because they cannot rely on the certainty of the law. This may seem puzzling because these laws are inactive and unenforceable. However, studies have documented statistically significant correlations between abortion restrictions and women’s decisions to undergo even lawful abortion procedures.

The adverse consequences of zombie laws and trigger laws extend to the political process. For example, William Michael Treanor and Gene B. Sperling argue that political actors may decline to pursue legislation because the courts have already acted. Thus, the revival of unconstitutional statutes may raise legitimacy concerns because the “very act of judicial invalidation powerfully shapes subsequent legislative deliberations.” As a result, these laws “can produce a result contrary to what the political process would have produced in the absence of the initial judicial decision.”

Significantly, zombie laws and trigger laws may not reflect the support of a state’s citizens at the time the juridical condition precedent is fulfilled. This represents their most significant flaw. The lag time between adoption and activation of these laws may be years or even decades. As this lag time grows, their electoral legitimacy becomes more tenuous. Moreover, intervening developments between adoption and activation may sever any meaningful connection between these distinct temporal moments. When zombie laws and trigger laws have been considered in abeyance for decades,

171 See Brady, supra note 33, at 1084.
175 See id. (emphasis in original).
176 See id.
177 See Berns, supra note 26, at 1688; Alexander, supra note 26, at 406.
178 See supra text accompanying notes 152–155.
179 See, e.g., Jarrod Shobe, Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting, 114 Colum. L. Rev. 807, 854–56 (2014) (describing “intertemporal statutory interpretation,” which considers “the context in which the statute was written”).
the passage of time also implicates the doctrine of desuetude, which holds that antiquated laws are no longer valid because they are no longer in use.\(^\text{180}\)

For these reasons, Treanor and Sperling would reject the writ-of-erasure fallacy, particularly when revival of the affected statute would constrain individual liberties.\(^\text{181}\) In these cases, “statutes that implicate individual liberty interests should be enforced only if the current majority supports them.”\(^\text{182}\) Their position builds on the work of Alexander Bickel, who argued that current majoritarian support should govern the application of the law.\(^\text{183}\) Treanor and Sperling suggest that the argument against enforcement “is strongest when the statute has long been unenforced because of a judicial decision that held the statute unconstitutional.”\(^\text{184}\)

Of course, every statute may be challenged upon adoption, and any statute may be found unconstitutional at some future date. The problem with zombie laws is that they have already been found unconstitutional. In these cases, the political process should reset to the status quo ante—to the time before the zombie law was adopted. This would provide legislatures the opportunity to reaffirm their belief in the value of the law, thereby incurring both the associated costs and benefits of political engagement.\(^\text{185}\) Apart from their democratic illegitimacy, zombie laws generate other problems. If zombie laws can be reactivated, they impose a significant burden on legislatures. Every year, state legislatures would need to determine whether a statute had been found unconstitutional and then adopt legislation formalizing that outcome by excising the statute from the code.\(^\text{186}\) Such a process is inefficient and certainly unnecessary.\(^\text{187}\)


\(^{181}\) See Treanor & Sperling, supra note 174, at 1955.

\(^{182}\) Id.


\(^{184}\) See Treanor & Sperling, supra note 174, at 1951.

\(^{185}\) See Brady, supra note 33, at 1083.

\(^{186}\) See Crawford, supra note 89, at 665.

Trigger laws are even more problematic because they are knowingly adopted in violation of extant constitutional law. Such action would seem counter to the oath of office that legislators take to “preserve, protect, and defend the Constitution and laws of the United States.” Moreover, accepting the legitimacy of trigger laws would incentivize legislatures to adopt unconstitutional laws in the hope that future courts would eventually activate them. They would be aided by what Guido Calabresi called the “burden of inertia” in a country “choking on obsolete statutes.” Such “hyperlexis” has “toxic effects upon liberty,” constraining both personal and economic liberty. When the Supreme Court holds that a statute is unconstitutional, there is value in finality, even in a system that allows for change.

In the absence of a duly enacted law, there can be no crime and no punishment. Nullum crimen sine lege is the consequence for violating the rule of legality. It offers a simple yet forceful defense to prosecution under zombie laws or trigger laws.

V. CONCLUSION

In Dobbs, the Supreme Court indicated that the authority to regulate or prohibit abortion should be returned “to the people and their elected representatives.”

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188 See TEX. CONST. art. 16, § 1; LA. CONST. art. 10 § 30 (1974) (“Every official shall take the following oath or affirmation: ‘I, ..., do solemnly swear (or affirm) that I will support the constitution and laws of the United States and the constitution and laws of this state ...’”).


190 GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 164, 169 (1982); see also Treanor & Sperling, supra note 174, at 1942.


192 See Daniel A. Farber, The Importance of Being Final, 20 CONST. COMMENT. 359, 360 (2003) (“Precedential supremacy means that government officials should treat settled judicial doctrine as binding precedent even when their actions are not subject to judicial review.”) (emphasis in original).
representatives."\(^{193}\) In fact, the Court repeated this specific phrase throughout its opinion.\(^{194}\) Yet, state use of zombie laws and trigger laws to prohibit and criminalize abortion is contrary to due process and the rule of law. Zombie laws are void. Trigger laws are void \textit{ab initio}.

If there are any doubts about the legitimacy of zombie laws or trigger laws, states should be obligated to enact new legislation affirming the prohibition on abortion.\(^ {195}\) Given the profound consequences of these laws, such action would be consistent with the Court’s stated desire to show deference “to the people and their elected representatives.”\(^ {196}\)

And yet, there is a final irony in the Court’s opinion. Returning the difficult decision of whether to terminate a pregnancy “to the people” should really mean returning it to the one person who is most directly affected by this decision—the pregnant person.

\(^{193}\) Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2259 (2022). Although deferring to the legislative and electoral process has credence in any democratic system, its call rings hollow when it is offered by a Court that has systemically undermined voting rights, particularly for people of color. See Sherrilyn Ifill, \textit{Stealing the Crown Jewels}, N.Y. REV. BOOKS (May 12, 2022), https://www.nybooks.com/daily/2022/05/12/stealing-the-crown-jewels-ifill-roe/ [https://perma.cc/LAP6-VZP6].

\(^{194}\) See, e.g., \textit{Dobbs}, 142 S. Ct. at 2259, 2279, 2284. The Court also referenced the need to return this issue to “the people’s elected representatives” on three occasions. \textit{Id.} at 2243, 2247, 2257. This would allow Congress to adopt federal restrictions on abortion rights. In fact, such laws have already been passed, and \textit{Dobbs} may embolden politicians to adopt even more restrictive legislation. See Jessica Arons, \textit{To See the Future of Roe, Look to the States}, ACLU (May 11, 2022), https://www.aclu.org/news/reproductive-freedom/to-see-the-future-of-roeslook-to-the-states [https://perma.cc/Q5TR-782P]; Caroline Kitchener, \textit{The Next Frontier for the Antiabortion Movement: A Nationwide Ban}, WASH. POST (May 2, 2022, 10:54 PM), https://www.washingtonpost.com/nation/2022/05/02/abortion-ban-roesupreme-court-mississippi/. Of course, the reverse is also true. Congress could adopt legislation protecting abortion rights.

\(^{195}\) See Alexander, supra note 26, at 391; Treanor & Sperling, supra note 174, at 1917.

\(^{196}\) See \textit{Dobbs}, 142 S. Ct. at 2259. Yet, the meaning of “the people” is far from clear. See generally Mila Versteeg, \textit{Unpopular Constitutionalism}, 89 IND. L.J. 1133 (2014) (discussing the weak link between a nation’s constitutional choices and the values of its citizens); Neal Devins, \textit{The D’Oh! Of Popular Constitutionalism}, 105 MICH. L. REV. 1333 (2007) (arguing that most U.S. citizens are uninterested in the Constitution).